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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. PD – 1043-16

COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/3/2017
ABEL ACOSTA, CLERK

JOHNTAY GIBSON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

Review has been Sought from the 14th Court of Appeals at Houston
In Cause No. 14-14-00595-CR

BRIEF IN SUPPORT OF
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT IS WAIVED

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IDENTITY OF PARTIES AND COUNSEL

1. The appellant is Johntay Gibson who is incarcerated for life in the Institutional Division of the Texas Department of Criminal Justice.

2. Trial attorneys for the State of Texas were Lisa Calligan and Marcey McNaulty whose address is 1201 Franklin, 6th Floor, Houston, Texas 77002.

3. The trial attorney for the appellant was R. P. "Skip" Cornelius whose address is 2028 Buffalo Terrace, Houston, Texas 77019.

4. The trial judge was The Honorable Brad Hart whose address is 1201 Franklin, 16th Floor, Houston, Texas 77002.

5. The District Attorney for Harris County, Texas is Kim Ogg whose address is 1201 Franklin, 6th Floor, Houston, Texas 77002.

6. The appellate attorney for the appellant is Kurt B. Wentz whose address is 5629 Cypress Creek Parkway, Suite 115, Houston, Texas 77069.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39.1(e) and 39.7 the appellant waives oral argument.

INDEX OF AUTHORITIES

CASES

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STATEMENT OF CASE

The appellant was found guilty of capital murder in a case in which the State did not seek the death penalty. The trial court denied the appellant's pretrial motion to suppress his two statements to the police and confirmed that ruling at trial after more evidence was elicited on the issue. (2RR 42, 43 and 6RR 78-80).

In Cause No. 14-14-00595-CR the 14th Court of Appeals at Houston found the appellant failed to preserve error on the admissibility of the appellant's unwarned second custodial statement because the appellant's argument on appeal did not comport with the objection at trial.

GROUND FOR REVIEW

When the basis for trial counsel's objection to the admission of the appellant's videotaped custodial statement was apparent at trial, the reviewing court should not avoid addressing that apparent issue by holding the appellant's argument on appeal does not comport with trial counsel's objection merely because the apparent issue is more specifically articulated on appeal.

STATEMENT OF FACTS

Acting in concert with other officers, H.P.D. Officer Nathan Carroll stopped Mr. Gibson for multiple traffic violations at 1:30 p.m. on February 20, 2013 knowing he was a suspect in a capital murder case arising from the robbery of a Boost Mobile phone store. (5RR 209, 222, 225). Carroll transported the appellant to the H.P.D. homicide division where he placed Mr. Gibson in an interview room and stood watch over him until H.P.D.

Investigator Isaac Duplechain could interrogate him. (2RR 21, 23, 26). There is no evidence Carroll or any other officer provided Mr. Gibson with his legal warnings prior to arriving at 1200 Travis.

At 4:30 p.m. Duplechain provided the appellant his legal warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966) and ***TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a)*** and ***3(a)(2)***. This interview concluded at 5:13 p.m. with the appellant denying any involvement in the alleged offense. (State's Exhibit 101, Part I, page 1-32).

From 6:42 p.m. to 6:45 p.m. H.P.D. Investigator Mark Stahlin questioned Mr. Gibson without providing any legal warnings. Stahlin obtained cell phone and personal information about the appellant and others involved in the case during this brief interval.

At some point prior to Duplechain's return, H.P.D. Sgt. Carless Elliott spoke to the appellant about the case without warning him. (8RR 178). The time and substance of this conversation was not recorded. (8RR 178).

At 10:35 p.m. Duplechain returned to the interview room with a substantial amount of new information about the case other officers had developed over the preceding five hours. Without being rewarned the appellant quickly confessed to being the "getaway driver" for co-defendants Brandon Johnson and Eric Washington who committed the robbery and shot the complainant. (State's Exhibit 101, Part II, page 13 and 17). The second statement concluded at 11:30 p.m. when Mr. Gibson indicated he did not want to talk anymore and desired to speak to an attorney. (2RR 32).

Prior to trial the Court heard the appellant's motion to suppress evidence. Among other issues raised in the motion the appellant alleged his statements to the police were in

violation of the 4th, 5th, 6th and 14th Amendments of the U. S. Constitution as well as ***Article 38.22*** and ***38.23*** of the ***Texas Code of Criminal Procedure***. (1CR 34-36).

The appellant did not present any evidence at the hearing. At its conclusion counsel adopted the arguments in his motion and stated they constituted his argument. (2RR 41).

The trial court found there was probable cause to stop and arrest Mr. Gibson and that the appellant's statements were freely and voluntarily made after he received his Constitutional and statutory warnings. (2RR 42). The trial court denied the appellant's motion to suppress evidence. (2RR 43).

At trial the parties relitigated the admissibility of the appellant's statements. Duplechain confirmed Elliott had had an unrecorded conversation with the appellant during which Elliott failed to advise the appellant of his Constitutional and statutory rights. (8RR 178). He also acknowledged the appellant slept off and on during the five-hour gap between the statements and had to be awakened when he returned. (8RR 167).

Immediately prior to the State offering the appellant's statement, State's Exhibit 99, counsel readdressed his objection to the admissibility of the appellant's second statement in a bench conference. Counsel argued the appellant should have provided his ***Miranda*** and ***Art. 38.22*** rights prior to the 10:35 p.m. statement being taken. (6RR 77, 78). Counsel argued the appellant's statement was not one continuous statement but rather two separate statements because of the five-hour gap between them. Counsel even stated this might be a point of error on appeal. (6RR 78). The trial court again denied counsel's motion. (6RR 78).

SUMMARY OF ARGUMENT

The issues raised on direct appeal relating to the appellant's unwarned second custodial statement comport with trial counsel's objection and the basis of that objection was sufficiently apparent to the trial judge and prosecuting attorney to preserve error for the purpose of ***Tex. R. App. P. 33.1(a)(1)(A)***.

GROUND FOR REVIEW RESTATED

When the basis for trial counsel's objection to the admission of the appellant's videotaped custodial statement was apparent at trial, the reviewing court should not avoid addressing that apparent issue by holding the appellant's argument on appeal does not comport with trial counsel's objection merely because the apparent issue is more specifically articulated on appeal.

ARGUMENT AND AUTHORITIES IN SUPPORT OF GROUND FOR REVIEW NO. 1

Applicable Law

Tex. R. App. P. 33.1(a)(1)(A) requires appellate error to be preserved by timely request, objection, or motion that advises the trial court with sufficient specificity of the complaint, unless the specific grounds for the complaint is apparent. General or imprecise objections will not preserve error unless the basis of the complaint is obvious to the trial judge and opposing counsel. ***Vasquez*** at 554 citing ***Buchanan v. State***, 207 S.W. 3rd 772, 775 (Tex. Crim. App. 2006).

The purpose for requiring timely specific objection is twofold: (1) It informs the judge of the basis for the objection and affords him an opportunity to rule on it, and (2) it

affords opposing counsel an opportunity to respond to the complaint. ***Zillender v. State***, 557 S.W. 2nd 515, 517 (Tex. Crim. App. 1977); ***Resendez v. State***, 306 S.W. 3rd 308, 313 (Tex. Crim. App. 2009). This requirement also provides the trial court with an opportunity to cure any harm resulting from any action giving rise to the objection. ***Zillender*** at 515 ***footnote 1***.

The complaint at trial is sufficiently specific if it clearly informs the trial judge what the party wants and why. ***Lankston v. State***, 827 S.W. 2nd 907, 909 (Tex. Crim. App. 1992). Litigants do not need to employ "specific words or technical consideration." ***Vasquez*** at 554 citing ***Layton v. State***, 280 S.W. 3rd 235, 239 (Tex. Crim. App. 2009).

The complaint on appeal must comply with the specific objection at trial; otherwise nothing is preserved for review unless the specific grounds is apparent. ***Wilson v. State***, 71 S.W. 3rd 346, 347 (Tex. Crim. App. 2002). The specific Constitutional or statutory provision cited on appeal need not have been cited at trial as long as the particular argument relied upon on appeal was presented to the trial judge and opposing counsel. ***Clarke v. State***, 270 S.W. 3rd 573, 582 (Tex. Crim. App. 2008).

Resolving questions of error preservation requires looking at the context of the complaint within the entire record. ***Resendez*** at 313.

Application of Law to Relevant Facts

Aside from the identity of the complainant's killers, the most noteworthy evidentiary aspect of Mr. Gibson's case was the five-our gap between his exculpatory warned recorded custodial statement at 4:35 p.m. and his inculpatory unwarned recorded statement at 10:35 p.m.

On direct appeal Mr. Gibson complained in Points of Error 4 and 5 the trial court abused its discretion in denying his motion to suppress because he did not receive his ***Miranda*** or ***Art. 38.22*** warnings prior to his second custodial statement at 10:35 p.m.

In his pretrial motion to suppress the appellant argued his statements should be suppressed because they violated the 4th, 5th, 6th and 14th Amendments of the U.S. Constitution and ***Art. 38.22*** and ***38.23*** of the ***Texas Code of Criminal Procedure***. (1CR 34-36). The 5th Amendment's right to silence is the basis of ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966). ***Art. 38.22*** provides the circumstances under which a recorded custodial statement is admissible. Because Duplechain provided the appellant with his ***Miranda*** and ***38.22*** rights prior to his first statement at 4:35 p.m. the application of this argument to the unwarned custodial statement five hours later is obvious.

The appellant's motion gave the trial judge adequate notice of why the unwarned second statement should be suppressed.

In ruling the appellant's statements were freely and voluntarily given after Mr. Gibson received his Constitutional and statutory warnings the trial judge indicated he was aware of the basis of the appellant's motion. Implicit in the court's ruling is its belief the statement was either one continuous statement, or the efficacy of the 4:35 p.m. warnings carried over to the 10:35 p.m. statement.

In relitigating the issue at trial the State more particularly articulated its contention the appellant's statement was one continuous seven-hour interview composed of two parts. (6RR 76, 78).

In a bench conference immediately prior to the State offering the appellant's statement, State's Exhibit No. 99, trial counsel argued:

> ". . . He wasn't rewarned. There was a five-hour gap. I don't know if the Court of Appeals would view that as one continuous interview or not. But I'm objecting to it and asking that it be suppressed, the second part of the interview because of the failure to rewarn him." (6RR 78).

Thus, the basis of counsel's objection could not be more apparent and did comport with the error raised on direct appeal.

Further evidence the trial judge understood the substance of counsel's objection to the admissibility of the second unwarned statement is provided by counsel's reference to an unrecorded bench conference during the charge conference. (8RR 220). Counsel clarified that in an earlier unrecorded bench conference he advised the Court he wanted to argue the five-hour gap between the two statements rendered the latter "suppressible." (8RR 220). Counsel added the Court would not allow such argument because the issue was a question of law. (8RR 220). The trial court confirmed the earlier unrecorded exchange as well as his instructions to counsel. (8RR 220).

As in ***Clarke v. State***, 270 S.W. 3rd 573, 581-83 (Tex. Crim. App. 2008) the appellant presented the same basic argument on appeal that was raised at trial. Counsel merely, to use Justice Cochran's words, "gussied up" his language and added more "whistles and bells on appeal." ***Id***.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the appellant prays this Court remand his case to the 14th Court of Appeals at Houston for consideration of Points of Error 4 and 5 in his original brief.

Respectfully submitted,

/s/Kurt B. Wentz_____
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CERTIFICE OF COMPLIANCE

I, Kurt B. Wentz, hereby certify the foregoing appellant's brief in support of his petition for discretionary review contains 2,365 number of words.

Signed this 1st day of February, 2017.

/s/Kurt B. Wentz_____
KURT B. WENTZ

CERTIFICATE OF SERVICE

I, Kurt B. Wentz, hereby certify that a true copy of the foregoing petition for discretionary review was sent to the State Prosecuting Attorney at P.O. Box 12405, Austin,

Texas 78711 and a second copy was hand delivered to the Assistant District Attorney for Harris County, Texas presently handling this cause on the 1st day of February, 2017.

/s/Kurt B. Wentz_____
KURT B. WENTZ